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No. 85-707

In The

Supreme Court of the United States

October Term, 1985

CITY OF PHILADELPHIA,
Petitioner,

v.

BOROUGH OF GLASSBORO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF AND APPENDIX IN OPPOSITION ON BEHALF OF RESPONDENTS STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ROBERT E. HUGHEY, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction to grant a writ of certiorari to the Supreme Court of New Jersey which affirmed, on interlocutory appeal, a preliminary injunction entered by a New Jersey trial court, where the case is still pending before the trial court and is scheduled for trial in January 1986 at which the state court will make a final determination of petitioner's federal claims.

2. Whether a preliminary injunction entered by a New Jersey court in order to avoid an imminent local public health crisis, that enjoins from disposal at an exhausted sanitary landfill in New Jersey solid waste generated in Philadelphia and other communities both within and without New Jersey which have available alternative waste disposal sites, and authorizes certain local communities with no present waste disposal alternatives to continue using the landfill on a temporary, conditional basis while they develop alternatives, violates the Commerce Clause of the United States Constitution.

LIST OF ALL PARTIES TO PROCEEDINGS

The list provided by petitioner should be supplemented to clarify that the interests of the State of New Jersey, Department of Environmental Protection and its Commissioner, Robert E. Hughey, as well as the position taken by said parties in the courts below, are clearly contrary to that of petitioner and, therefore, said parties should be regarded as respondents in the within action.

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JURISDICTIONAL COUNTER-STATEMENT

An order for preliminary injunction was entered by the Superior Court of New Jersey, Law Division, on November 13, 1984. Petitioner City of Philadelphia was granted leave to take an interlocutory appeal and the preliminary injunction was affirmed by the Superior Court of New Jersey, Appellate Division, on February 15, 1985. Leave for further interlocutory appeal was granted by the Supreme Court of New Jersey which, on July 10, 1985, affirmed the decision of the Appellate Division. The case is presently scheduled for a trial on the merits to commence January 14, 1986, at which petitioner's constitutional claims will be further litigated and finally resolved. Since the case involves an interlocutory order and there has been no final judgment by the state courts, the Supreme Court lacks jurisdiction. 28 *U.S.C.* §1257(3).

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COUNTER-STATEMENT OF THE CASE

On July 10, 1985, the Supreme Court of New Jersey rendered a decision on an interlocutory appeal upholding a preliminary injunction which seeks to avert an imminent public health crisis in certain New Jersey municipalities by regulating waste flows to a landfill which has virtually exhausted its useful life. The preliminary injunction bars from disposal at the landfill wastes generated in certain municipalities both within and without New Jersey which have alternative facilities available, while permitting municipalities which lack alternatives to continue using the landfill on a temporary, conditional basis. The case is presently scheduled for trial on January 14, 1986.

Kinsley Landfill, Inc., (Kinsley) is a privately owned landfill subject to regulation by the New Jersey Department of Environmental Protection (DEP) as to environmental concerns and by the Board of Public Utility Commissioners (BPU) as to economic matters. For approximately 25 years, Kinsley has operated as a major solid waste disposal facility in southern New Jersey. Its most recent permit, issued by DEP on September 26, 1980, authorized the landfill to dispose of solid waste to a height of 164 feet. On October 11, 1984, Kinsley notified its customers that because it was about to reach this permitted capacity it would close on October 28, 1984. Shortly thereafter, the Borough of Glassboro (Glassboro), one of the municipalities disposing of solid waste at the landfill, instituted an action in the Superior Court of New Jersey, Law Division, seeking to enjoin both the closure of the landfill and the use of the landfill for disposal of solid waste originating in petitioner City of Philadelphia. The defendants included Philadelphia, Gloucester County, and DEP. Various other parties were joined or have intervened in the proceedings.

The trial court conducted hearings over several days on Glassboro's request for a temporary restraining order. On October 26, 1984, two days before the scheduled closure of the landfill, the court issued a restraining order. The court found that Kinsley was rapidly approaching the end of its useful life and that it should be closed. Although the court found that continued use of the landfill beyond the permitted design capacity threatened the health and safety of the citizens of the municipality in which the landfill is located, Deptford Township, the court found that immediate closure would cause irreparable harm to the citizens of

Glassboro and certain other municipalities because they lacked alternative disposal sites. The court thus determined to temporarily restrain the landfill from closing and ordered Gloucester county to establish "a reasonable site for alternative solid waste disposal." The Court reserved decision on the application for restraints against petitioner (Pet. App. 4a-7a).

In accordance with a suggestion made by Kinsley's engineer, the trial court ordered Kinsley to submit to DEP engineering designs for an additional lift which would expand the height of the landfill by 16 feet. As ordered by the court, DEP reviewed these plans and submitted a report to the court for consideration in connection with the application for a preliminary injunction.

The report cited, among other things, the lack of an alternate disposal facility in New Jersey for the waste dumped at Kinsley. Consequently, the Counties of Gloucester, Camden and Salem (the three counties or the tri-county area), which account for most of the New Jersey generated waste deposited at the landfill, should expeditiously site and implement alternative landfills. Although established DEP procedures for opening a landfill ordinarily take at least two years, DEP would process the applications on an emergent basis, so that the counties might endeavor to implement alternate facilities within approximately one year. In the interim, the report concluded Kinsley could safely accommodate the limited, sixteen foot vertical expansion.

At the hearing on the preliminary injunction application, the trial court accepted the DEP report in its entirety and, consistent with that report, made certain findings. First, the trial court found that at then current

levels of waste disposal at Kinsley, the additional capacity created by the one lift expansion would be reached in approximately 3½ months. Most of the solid waste then dumped at the landfill emanated from Pennsylvania, with virtually all of that waste coming from petitioner. For example, petitioner provided 53.9% of the 4,738,783 cubic yards of waste dumped at the landfill during the period of July 1, 1983 through May 31, 1984. According to waste flow registration statements which petitioner filed with DEP, this volume represents a dramatic increase over petitioner's prior use of the landfill. For example, in 1981 to 1982 petitioner disposed of 784,770 cubic yards at the facility, and, in 1982 to 1983 this figure had grown to 1,136,785 cubic yards. While the tri-county area accounted for most of the waste emanating from New Jersey which was dumped at Kinsley, approximately 6.1% of the waste came from 13 other New Jersey counties (Pet. App. 28a).

In an effort to conserve the capacity of the landfill, DEP had, since 1980, required petitioner as well as the affected New Jersey counties, to sign an interdistrict waste flow agreement with Gloucester County as a condition of continued use of the Kinsley landfill. Notwithstanding DEP's urging, petitioner had not executed such an agreement, the basic instrument under New Jersey law for planning and managing the disposal of solid waste generated outside a district such as Gloucester County. The trial court found that Gloucester County had negotiated with petitioner in good faith in an effort to reach accord on an interdistrict wasteflow agreement, but notwithstanding Gloucester's effort no accord was reached. As a result, petitioner failed to share in efforts to conserve space at the landfill by restricting all waste flows to the facility, an es-

sential component of waste flow agreements. Accordingly, the court found that the disposal of waste by petitioner at the landfill had "continued to escalate at an alarming rate unlike those districts subject to interdistrict agreements." (Pet. App. 10a).

Also consistent with the DEP report, the trial court found that petitioner, unlike the municipalities in the tri-county area, could accommodate the closure of the Kinsley landfill, as petitioner's own Commissioner of Streets had testified. Even when Kinsley was operating under a DEP permit, petitioner sent half of its garbage elsewhere. Petitioner not only enjoys access to alternative sites, but also has the equipment and material for routing its solid waste elsewhere. In contrast, affected municipalities in the tri-county area had no alternative to Kinsley. Unlike petitioner, they lacked the trucks, transfer stations, equipment and other resources necessary to dispose of their waste at more distant sites. The court thus determined that 59 municipalities in the tri-county area had no alternative to Kinsley and, if the landfill were closed precipitously, they could not provide for waste disposal, creating a public health crisis (Pet. App. 8a-11a; 40a-43a). Finally, consistent with the DEP report, the trial court found that the municipalities in the tri-state area should implement vigorous recycling programs in order to reduce waste flows (Pet. App. 13a).

In view of these findings, the trial court decided that the most equitable result was to exclude from Kinsley the solid waste originating in Philadelphia and from other municipalities, both within and without New Jersey, which had alternative disposal sites available to them. In addition, the municipalities in the tri-county area which continued to use Kinsley would be required to implement man-

datory recycling programs. The result of the decision was to extend the life of the landfill for approximately one year, the estimated time necessary for the three counties to implement alternative sites.

Consequently, on November 13, 1984, the trial court entered an order for preliminary injunction, ordering, among other things that: 1) the counties of Camden, Gloucester, and Salem develop new landfills to become operational within twelve months in accordance with a specific schedule; 2) Kinsley Landfill cease accepting by November 27, 1984 all solid waste generated outside of the Gloucester County solid waste management district, from both within and without New Jersey, which is not subject to interdistrict waste flow agreements, including waste generated within Philadelphia; 3) all municipalities in Gloucester, Camden and Salem Counties which utilize the Kinsley Landfill must, by November 27, 1984, maximize recycling efforts including curb side pickup of recyclables and mandatory recycling ordinances; 4) a minimal vertical expansion of the Kinsley Landfill for a single additional lift of compacted solid waste would be implemented in order to provide certain communities in the tri-county area which lacked alternatives to Kinsley with waste disposal facilities until alternatives were developed; 5) Kinsley was to be closed for all sludge disposal on March 15, 1985.*

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* While there were subsequent orders of the trial court clarifying the preliminary injunction with respect to sludge disposal, including that order reproduced in petitioner's appendix at 123a, effective March 15, 1985 Kinsley was closed for all sludge disposal as ordered by the trial court. This includes sludge generated in the tri-county area. As a result, the amount of waste generated in New Jersey which is presently barred from Kinsley as a result of the preliminary injunction is even greater than the quantity set forth in the decision of the Supreme Court of New Jersey.

The injunction also provided that any party could move on one-day notice for dissolution or modification (Pet. App. 12a-14a).

In reaching this decision, the trial court considered and rejected petitioner's Commerce Clause arguments. The court found that the order was consistent with the decision of this Court in *Philadelphia v. New Jersey*, 437 *U.S.* 617 (1978), given petitioner's failure to cooperate in efforts to control and manage all waste flows into the Kinsley landfill through interdistrict agreements, and the phenomenal increase in waste flows to Kinsley's from petitioner during the preceding few years unlike waste flows from communities governed by interdistrict agreements (Pet. App. 94a-99a). The court also determined that its order was a legitimate exercise of the police power given petitioner's admitted ability to accommodate the closure of the landfill, whereas the communities in the tri-county area could not and would face an imminent health hazard the landfill closed before alternatives were developed (Pet. App. 99a-100a).

On November 15, 1984 and again on November 21, 1984, petitioner moved before the trial court seeking reconsideration of the November 13, 1984 order, and also asked the court to authorize a further vertical expansion of the landfill for a second 16 foot lift to accept waste flows from Philadelphia at reduced levels. While petitioner submitted expert testimony in support of its contention that such a further vertical expansion of the facility would be environmentally safe, the trial court found the testimony of a witness presented by DEP to be more credible and denied petitioner's motions (Pet. App. 194a-195a).

Petitioner was granted leave to take an interlocutory appeal to the Appellate Division of Superior Court and, on February 15, 1985, the Appellate Division rendered a decision affirming the preliminary injunction. The Appellate Division found the trial court's factual findings to be supported by the evidence (Pet. App. 54a). The court concluded that the case presented an "imminent public health crisis" affecting the tri-county area (Pet. App. 63a), and that this emergency differed from "the everyday, business-as-usual commerce between the several states envisioned by *Philadelphia v. New Jersey*, 437 *U.S.* 617 (1978)." (Pet. App. 63a). The court found that the particular facts of this case presented an emergent public health crisis "probably more compelling and dangerous than the local burdens on commerce historically tolerated, as shown by the 'quarantine' cases." Thus, the trial court's order was not concerned with economic protectionism, but with "imminent considerations of public health and safety" (Pet. App. 63a-64a).

Additionally, based on the record before it the court determined that the burdens on interstate commerce were not excessive in light of the substantial state interest in resolving a public health crisis (Pet. App. 68a-69a). Rather, the Appellate Division concluded that given the "veritable doomsday" crisis affecting the tri-county area, an injunction which bars from Kinsley both in-state and out-of-state users from outside the tri-county area affected by the emergency for a limited period of time (amounting to only 3% of the temporal life of the landfill) strikes the right balance and is respectful of the "sanctity of our Union and the federal system, as well as for local concerns." (Pet. App. 77a-78a).

The Supreme Court of New Jersey granted petitioner's motion for leave to take an interlocutory appeal and, on July 10, 1985, rendered a decision affirming the judgment of the Appellate Division. *Glassboro v. Gloucester County Board of Chosen Freeholders,* 100 *N.J.* 134, 495 *A.*2d 149 (1985) (Pet. App. 1a-48a). The Supreme Court of New Jersey first determined which of two standards was applicable to its analysis of petitioner's Commerce Clause claims. The first standard, which applies when a state regulation manifests simple economic protectionism, results in a virtual *per se* rule of invalidity (Pet. App. 20a). See *Philadelphia v. New Jersey, supra,* 437 *U.S.* at 624. The court stated that "a second, more flexible, standard applies when a state regulation advances legitimate local interests and does not facially discriminate against interstate commerce," citing *Pike v. Bruce Church, Inc.* 397 *U.S.* 137, 142 (1970) (Pet. App. 22a).

The court contrasted the narrowly tailored preliminary injunction at issue herein, which bars Philadelphia-generated waste from a single landfill in New Jersey and for a limited period of time in response to an immediate public health crisis, with the blanket ban excluding virtually all out-of-state waste which had been held invalid in *Philadelphia v. New Jersey, supra* (Pet. App. 26a). The court determined that the primary purpose and effect of the preliminary injunction is to avoid a public health crisis in those communities which lack alternative waste disposal options, and that the injunction is not an economic protectionist measure. Thus, the court held that the injunction operated in an evenhanded manner, restricting waste flows from those communities with alternatives to the Kinsley landfill to the extent necessary in order to protect other communities which need time to develop such alternatives.

> [S]everal reasons compel the conclusion that the place of origin is unrelated to the injunction against the continued dumping of Philadelphia garbage at Kinsley. . . Thirteen New Jersey counties, which account for approximately 6.1% of the waste disposed of at Kinsley, are also excluded. . . . If no state line existed between New Jersey and Pennsylvania, we would uphold the injunction as a valid exercise of the powers of a court of equity. As an equitable remedy, the decree preserves space at Kinsley for certain municipalities that, as a practical matter, do not have access to other landfills, while remitting other municipalities, including Philadelphia, to alternative sites. . . . The mere fact that Philadelphia is in another state should not imbue it with greater rights than it would possess if it were located in New Jersey. The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain a preference. We conclude that the injunction is not discriminatory in purpose or effect. It is plainly not a mere protectionist measure, and, therefore, does not constitute a *per se* violation of the Commerce Clause [Pet. App. 27a-29a].

Accordingly, the court proceeded to apply the more flexible standard set forth in *Pike v. Bruce Church, Inc., supra,* 397 *U.S.* at 142, and proceeded to balance the local benefits with the burdens on interstate commerce. The court easily determined that abating a public health emergency in the tri-county area is a legitimate local concern, as are New Jersey's efforts to plan for the disposal of solid waste through interdistrict agreements. In this regard, the court emphasized New Jersey's own efforts to conserve its landfill space, noting that at "Kinsley, the availability of the additional lift is not the result of happenstance, but of New Jersey's conservation efforts." (Pet. App. 38a). The court determined that New Jersey used interdistrict agreements as a key component of its solid

waste management efforts (Pet. App. 38a). Yet, petitioner failed to cooperate.

> Significantly, the trial court found that the solid waste generated by Camden and Salem counties, which executed such agreements, remained constant. In contrast, Philadelphia, which did not sign an interdistrict agreement, tripled the amount of garbage it dumped at Kinsley from 1981 to 1984 [Pet. App. 39a].

The Supreme Court of New Jersey also emphasized that "[w]ere it not for the injunction . . . the landfill would be closed not only to former customers outside the tri-county area, such as Philadelphia, but also to those within the three counties." The injunction was entered in order to keep the landfill open long enough to avoid a waste disposal catastrophe and resultant public health crisis in the tri-county area. "So considered, the effect of the injunction on interstate commerce is incidental." (Pet. App. 40a).

The court also held that even if the effect could be characterized as more than incidental, the burden falling on Philadelphia would not be clearly excessive, contrasting Philadelphia's lost access to the exhausted landfill with the "disastrous results that its continued use would visit on the tri-county municipalities." (Pet. App. 40a-41a). The court found that the economic effect on Philadelphia, a city of approximately 1.7 million people, would be to increase its annual waste disposal costs by 5 percent for the first year following Kinsley's closure and 2 percent thereafter. In contrast, the solid waste disposal budget of Glassboro, a municipality of some 14,500 people, would escalate from $100,000 to a million dollars per year, and the cost to Camden County, which has a population of approximately 500,000 people could increase annually from

3 million dollars to 12 million dollars. The court further emphasized, however, that the closure of Kinsley's involves far more than mere economic considerations. The court noted that many of the municipalities in the tri-county area literally had no alternative to Kinsley given their lack of access to alternative sites and their lack of the trucks, equipment, and transfer stations needed to utilize more distant sites. Thus, if the landfill were closed precipitously, waste would remain uncollected on the streets of these towns. Given these facts, the court concluded that the burden on Philadelphia is not excessive (Pet. App. 41a-43a).

Finally, the court determined that the record established that the local interests could not be achieved as well with a lesser impact on interstate commerce. The court determined that a plan which afforded Philadelphia access to the landfill, even if proportionately reduced, "would not merely be a less effective means of obtaining time for the development of alternative sites, it would be ineffective." The threat to local health could not be averted by a less restrictive injunction (Pet. App. 46a). In addition, the court accepted the credibility findings upon which the trial court based its decision to deny Philadelphia's motion to expand the landfill by a second additional lift.

Today, the preliminary injunction remains in effect pending a final determination of all issues at a plenary trial to commence on January 14, 1986. Many issues remain to be tried including a claim that the Kinsley landfill can safely expand and continue operating for an additional ten years. Petitioner has also indicated its intention to produce evidence at trial in support of its Commerce Clause claims (Resp. App. 1a-4a) and these federal issues will be fully litigated and will be finally determined after the trial on the merits.

ARGUMENT

A. THE SUPREME COURT LACKS JURISDICTION TO GRANT THE WRIT OF CERTIORARI BECAUSE THERE HAS BEEN NO FINAL JUDGMENT BY THE STATE COURTS.

It is fundamental that the jurisdiction of the Supreme Court to review State court determinations is limited to final judgments. 28 *U.S.C.* § 1257; *Costarelli v. Massachusetts,* 421 *U.S.* 193, 195, n.3 (1975). This Court has said that to satisfy the "finality" requirement, an order of a state court

> must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Market Street Railway Company v. Railroad Commissioner, 324 U.S. 548, 551 (1945). See also *Rosenblatt v. American Cyanamid Company,* 86 S.Ct. 1, 15 *L.Ed.*2d 39 (1965) (Opinion in Chambers). This requires a decision which is final as to all parties and all issues, final "as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller,* 252 *U.S.* 364, 370 (1920) see also *Republic Natural Gas Co. v. Oklahoma,* 334 *U.S.* 62, 68 (1948). The finality requirement is designed to avoid the evils of piecemeal review and is founded upon considerations generally applicable to sound judicial administration. *Chapman v. California,* 405 *U.S.* 1020 (1972); *Radio Station WOW, Inc. v. Johnson,* 326 *U.S.* 120, 124 (1945).

In the instant case, a state trial court has entered an order for preliminary injunction and, while the Supreme

Court of New Jersey has allowed petitioner to take an interlocutory appeal and has upheld the preliminary injunction, the case is pending in the trial court where it is scheduled to go to trial on January 14, 1986. Petitioner has indicated its intention to offer additional evidence at trial relative to its Commerce Clause claims (Resp. App. 1a-4a), and these issues will be litigated and finally resolved at trial. Accordingly, the decision of the Supreme Court of New Jersey is but an intermediate step in the ongoing state court proceedings, and there has been no final word by the New Jersey courts on petitioner's Commerce Clause claims. Accordingly, the threshold requirement of finality has not been met.

Of course, this Court is willing to give the concept of finality a practical construction, *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 *U.S.* 542 (1963), and, in certain narrowly defined situations, the Court may treat a matter as final notwithstanding continuing state court proceedings. A definitive statement of the types of cases where the Court has found finality despite ongoing state court proceedings is contained in the Court's opinion in *Cox Broadcasting Corp. v. Cohn*, 420 *U.S.* 469, 479-485 (1975).

The first such situation arises when "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the State court on the federal issue is deemed final." *Cox, supra*, 420 *U.S.* at 479. See, *e.g., Local No. 438 Construction and General Laborers' Union v. Curry, supra*, (where the state court had already decided the merits of the case in connection with a temporary injunction and petitioner had no other defense to

offer with respect to the permanent injunction, the state court decision was a final disposition as a practical matter); *Richfield Oil Corp. v. State Board of Equalization,* 329 *U.S.* 69 (1946) (stipulated facts which preordain outcome of additional state court proceedings render initial state court decision final for purposes of Supreme Court review).

The instant case, however, stands in sharp contrast to the cases cited above. In the instant case, a plenary trial will soon be held at which time the trial court will finally resolve petitioner's federal claims. These claims are inextricably intertwined with the complex factual web which will be untangled at the trial on the merits. For example, petitioner has stated that it will try to prove at trial that the injury which it is suffering as a result of the preliminary injunction is not as insignificant as appeared at the preliminary injunction hearing, and that the municipalities in the tri-county area will not suffer any greater injury if denied access to Kinsley than that suffered by petitioner (Resp. App. 1a-4a). In addition, another party asserts that the Kinsley landfill may safely expand and must be permitted to continue operating for another 10 years. Obviously, the final resolution of these factual issues at trial could effect the factual underpinnings of the State courts' preliminary determination of petitioner's Commerce Clause claims, and the trial court may well decide to dissolve the restraints and allow petitioner to resume dumping at Kinsley. Since the decision of the Supreme Court of New Jersey does not preordain the outcome of the upcoming trial, it is clear that the finality requirement has not been satisfied in the present case. *Cox, supra,* 420 *U.S.* at 479.

The second situation outlined by this Court in which Supreme Court review may be allowed despite ongoing State court proceedings arises in cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future State court proceedings." *Cox, supra,* 420 *U.S.* at 480. See *Radio Station WOW, Inc. v. Johnson, supra,* 326 *U.S.* at 124-127 (subsequent accounting could not affect decision on federal issue regarding possession of property); *Brady v. Maryland,* 373 *U.S.* 83, 85, n.1 (1963) (subsequent determination of ultimate sentence issued cannot affect the determination that the appellant was properly convicted); *New York v. Cathedral Academy,* 434 *U.S.* 125 (1977) (subsequent determination of the amount due under a statute cannot affect the determination that the statute is constitutional). This siuation is also inapplicable to the present case because, as set forth above, the outcome of the factual issues to be determined at the plenary trial might well affect the determination of petitioner's Commerce Clause claims. For example, if the landfill closes on or near schedule, and accepts no waste from any source, petitioner's claims become moot. Similarly, if the landfill expands and continues operating for an additional 10 years, the imminent health crisis in the tri-county area, which underlies the state courts' preliminary determination of petitioner's Commerce Clause claims, would no longer exist.

Cases "where the federal claim has been finally decided, with further proceedings on the merits in the State courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case . . .," gives rise to a third situation in which this Court

may find finality for purposes of its review notwithstanding continuing state court proceedings. *Cox, supra,* 420 *U.S.* at 481. Such a situation existed in *California v. Stewart,* 384 *U.S.* 436, 498, n. 71 (1966) (decided with *Miranda v. Arizona*). In that case, a state appellate court reversed a criminal conviction on constitutional grounds. Thus, if the state prevailed at a new trial the state's constitutional argument would be rendered moot and, if the defendant were acquitted at the new trial, the state would be precluded from further appealing the case. Clearly such is not the situation in the instant case. As set forth above, the trial court will be conducting a plenary trial on the factual issues which may be dispositive of petitioner's federal claims. Unlike the situation in *California v. Stewart, supra,* in the event petitioner does not prevail at trial, issues such as double jeopardy will not preclude petitioner from presenting its federal claims for review after a final judgment by the state courts.

Finally, Supreme Court review has been allowed notwithstanding ongoing state court proceedings in a line of cases where the party seeking review might prevail in the state courts on nonfederal grounds, rendering later review of the federal issue unnecessary, but the judgment is nevertheless deemed final because a refusal of immediate review might seriously erode an important federal policy. *Cox, supra,* at 482-483. See *Local No. 438 Construction and General Laborers' Union v. Curry, supra; Nebraska Press Association v. Stuart,* 423 *U.S.* 1327 (1975); *National Socialist Party v. Skokie,* 432 *U.S.* 43 (1977). Yet, as set forth below, it is clear that the present matter is not such an extraordinary case.

Local No. 438, supra, involved an action by an employer to enjoin a labor union from picketing, in which the union

claimed its activities were within the exclusive jurisdiction of the National Labor Relations Board. The Supreme Court of Georgia, reversing a lower court, ordered that a preliminary injunction issue. This Court held that the issue before its was not the legality of the picketing but "whether the Georgia courts had power to proceed with and determine this controversy." 371 *U.S.* at 458. Since the State court had "finally and erroneously" resolved this jurisdictional issue, *ibid,* this Court concluded that the finality requirement of 28 *U.S.C.* § 1257 had been met. In so ruling, the Court emphasized that if the issue were "whether a [state] court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction," the case would not be ripe for Supreme Court review. 371 *U.S.* at 458. Since the precise issue in the present case is whether in issuing a preliminary injunction the New Jersey courts have erroneously decided a matter of federal law in a case admittedly within their jurisdiction, it is obvious that *Local No. 438* is inapplicable.

Nebraska Press Association v. Stuart, supra, and *National Socialist Party v. Skokie, supra,* are inapposite since both are clearly "center[ed] upon cherished First and Fourteenth Amendment values." *Nebraska Press Association, supra,* 423 *U.S.* at 1327; *see National Socialist Party v. Skokie, supra,* 432 *U.S.* at 44. Both cases involved instances of prior restraint on the exercise of First Amendment rights, situations which always bear "'a heavy presumption against [their] constitutional validity.'" *Id.* at 1328, quoting *New York Times Co. v. United States,* 403 *U.S.* 713, 714 (1971); *see National Socialist Party v. Skokie, supra,* 432 *U.S.* at 44. In holding that the imposition of prior restraints by the State courts involve

rights "separable from, and collateral to" the the merits, *ibid,* quoting *Cohen v. Beneficial Industrial Loan Corp.,* 337 *U.S.* 541, 546 (1949), this Court made clear that the *Skokie* and *Nebraska Press* decisions are themselves clearly inseparable from cherished First Amendment values and the inherent repugnancy of prior restraints to such values. 432 *U.S.* at 44; 423 *U.S.* at 1329-1330. The instant case, however, in no way involves prior restraint or First Amendment issues and, therefore, this case does not present the extraordinary circumstances present in the cases cited above.

Thus it is clear that the present case does not involve a situation in which Supreme Court review may be had notwithstanding ongoing state court proceedings. There has been no final determination of the litigation nor has there been a final resolution of petitioner's Commerce Clause claims. All that has been decided is that the preliminary injunction will remain in effect pending final resolution of all issues, including petitioner's Commerce Clause claims, at a plenary trial. If such a preliminary injunction constitutes a final judgment within the meaning of 28 *U.S.C.* § 1257, it is difficult to see how this case could be distinguished from the many other cases arising each year in the state courts where there has been an interlocutory order notwithstanding allegations of infringement of various constitutional rights. Quite clearly the intervention of this Court in the present case would run counter to the basic principles of sound judicial administration and would involve the evils of piecemeal review sought to be avoided by the finality requirements of 28 *U.S.C.* § 1257.

In sum, the writ sought should be denied because there has been no final judgment of the highest court of the state and thus, this Court lacks jurisdiction to grant the writ.

B. THE COURTS BELOW PROPERLY HELD THAT THE PRELIMINARY INJUNCTION DOES NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT IS BASED UPON AN EVENHANDED EQUITABLE SCHEME WHICH EFFECTUATES LEGITIMATE LOCAL PUBLIC INTERESTS WITH ONLY INCIDENTAL EFFECTS ON INTERSTATE COMMERCE.

Petitioner argues that the November 13, 1984 order of the trial court imposes an impermissible burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution, Article I, § 8, cl.3. While the Constitution gives Congress the power to regulate commerce among the states, many subjects of potential federal regulation under that power inevitably escape Congressional attention "because of their local character and their number and diversity." *South Carolina v. Barnwell Brothers*, 303 *U.S.* 177, 185, rehearing denied 303 *U.S.* 667 (1938). *Philadelphia v. New Jersey, supra.* In the absence of federal legislation, these subjects are open to control by the states so long as they act within the restraints imposed by the Commerce Clause itself. *See Raymond Motor Transportation, Inc. v. Rice*, 434 *U.S.* 429 (1978). One such area in which the states have retained significant power to regulate is that of environmental protection and resource conservation. *Minnesota v. Clover Leaf Creamery Co.*, 449 *U.S.* 456, rehearing denied 450 *U.S.* 1027 (1981); *Philadelphia v. New Jersey, supra.* Moreover, when a state is faced with an imminent public health and welfare crisis, this Court has historically tolerated local burdens on interstate commerce. *See Asbell v. Kansas*, 209 *U.S.* 251 (1908); *Reid v. Colorado*, 187 *U.S.* 137 (1902); *Baldwin v. G.A.F. Sellig, Inc.*, 294 *U.S.* 511 (1935); *Bow-*

man v. Chicago & Northwestern Railway Co., 125 *U.S.* 465 (1888).

Decisions of the Supreme Court which define the limitations imposed by the Commerce Clause have attempted to reconcile the conflict between state regulations designed to further legitimate local interests, such as the sound disposal of solid waste, and the unavoidable burden which such regulation may have upon interstate commerce. *Sphorhase v. Nebraska ex rel. Douglas*, 458 *U.S.* 941, 956-957 (1982); *Philadelphia v. New Jersey, supra*, 437 *U.S.* at 623-624. If the state regulation purporting to promote environmental purposes is in reality "simply economic protectionism," the Supreme Court has applied a "virtual *per se* rule of invalidity." *Minnesota v. Clover Leaf Creamery Co., supra*, 449 *U.S.* at 471; *Philadelphia v. New Jersey, supra.*

However, where valid local interests are advanced and there is not patent discrimination against interstate trade, the Court has adopted a more flexible standard, stated in *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142 (1970), as follows:

> where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also, Minnesota v. Clover Leaf Creamery, Co., supra, 449 *U.S.* at 471; *Philadelphia v. New Jersey, supra,* 437 *U.S.* at 624.

Thus, the Commerce Clause test is to determine whether a) the challenged state regulation is patently discriminatory, and, if not b) whether it effectuates legitimate local purposes, and c) whether the incidental burden on interstate commerce is excessive in relation to the local interest served. *Pike v. Bruce Church, Inc., supra; Philadelphia v. New Jersey, supra.*

Petitioner's reliance on *Philadelphia v. New Jersey, supra,* is misplaced. In that case the Supreme Court held invalid a New Jersey statute which imposed a total and absolute ban on the disposal in New Jersey of virtually all solid waste generated outside of the State solely because of its origin. This Court held at 437 *U.S.* at 626-628,

> But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside of the state *unless there is some reason apart from their origin, to treat them differently* . . . .
>
> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the *full burden* of conserving the State's remaining landfill space. [Emphasis added].

In the instant case, however, the trial court faced an immediate crisis and determined that extraordinary, emergent, equitable relief was necessary in order to avoid dire consequences. The court responded by balancing the equities, entering a preliminary injunction based upon evenhanded considerations, an injunction which is necessary to effectu-

ate a legitimate local interest and which poses only incidental and *de minimis* burdens on interstate commerce.

There is no lawful disposal capacity remaining at the Kinsley Landfill. The landfill has reached its authorized limits; there is no more room. Under these circumstances, the New Jersey courts have held that if there is continued use of the landfill beyond its useful life people residing near the facility will be seriously and deleteriously affected. (Pet. App. 6a). The preliminary injunction thus ordered the three counties to implement new, alternative landfills on an unprecedented accelerated schedule. Yet, the New Jersey courts have also held that until these alternative facilities are established, the municipalities in these counties have no alternative to Kinsley for disposal of their waste and would thus face a public health emergency if the landfill is closed before these alternatives become available. Petitioner, however, would suffer no comparable injury if the landfill were closed. Uncollected waste would not sit on the streets of Philadelphia because there are alternative sites available to it, and petitioner has the equipment, material and resources to transport waste to these sites, unlike the municipalities in the tri-county area (Pet. App. 10a-11a; 40a-43a; 59a; 63a-64a). Moreover, the court found that while a little more life could be squeezed out of the landfill and that one more lift could be added consistent with minimal environmental standards, if this small remaining safe disposal capacity is to be effective in easing the waste disposal emergency in the tri-county area by lasting until the alternatives become operational, waste flows to Kinsley must be substantially reduced.

Given these facts, the trial court's response was not an across-the-board ban on disposal anywhere in New Jersey

of virtually all waste generated outside of the State. Rather, the court carefully crafted a limited remedy, restricting access to a single landfill and for a limited time period by barring both in-state and out-of-state waste from outside the area affected by the emergency. Further, the court did not merely transfer a problem across state lines, but averted a local emergency by restricting waste from communities such as petitioner, which admittedly could, and in fact have, accommodated the restriction without adverse public health consequences. The contest was between petitioner, a generator of waste which conceded it had alternatives (albeit slightly more expensive) available to accommodate its waste flow, and certain New Jersey generators without alternatives or indeed time to develop same if they were deprived of what limited life remained at Kinsley.

Thus, the injunction is not mere economic protectionism. Rather, as stated by the Supreme Court of New Jersey, the injunction simply "treats Philadelphia like the thirteen New Jersey counties that formerly used Kinsley." (Pet. App. 25a).

> If no state line existed between New Jersey and Pennsylvania, we would uphold the injunction as a valid exercise of the powers of a court of equity. . . . The mere fact that Philadelphia is in another state should not imbue it with greater rights than it would possess if it were located in New Jersey. The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain a preference [Pet. App. 28a-29a].

Thus, *Philadelphia v. New Jersey, supra,* is not only distinguishable from the instant case but, it is totally distinct, and petitioner's reliance on that precedent is devoid of merit.

Indeed, the imminent public health emergency present in the instant case presents a situation more compelling and dangerous than that presented in other cases, such as the "quarantine" cases, where local burdens on commerce historically have been tolerated. *See Asbell v. Kansas, supra; Reid v. Colorado, supra; Baldwin v. G.A.F. Sellig, Inc., supra; Bowman v. Chicago & Northwestern Railway Co., supra.* The decision of the Supreme Court of New Jersey represents not the "flaunting" of the dictates of this Court, but an affirmation of this Court's determination that the preservation of a vital resource in times of severe shortage for the purpose of protecting the health of their citizens is at the core of the states' police power and, thus, such health and safety regulation, as opposed to economic protectionism, can withstand constitutional scrutiny. *Sporhase v. Nebraska ex rel. Douglas, supra.*

In sum, it is clear that the preliminary injunction is not mere economic protectionism, but is based upon neutral criteria which are not patently discriminatory against interstate commerce because the purpose and effect of the order is to regulate the waste flow to Kinsley not simply as a result of the state of origin of the waste, but, rather, based upon whether or not a community, wherever located, will face a public health crisis if its access to Kinsley were immediately terminated.

In addition, it is submitted that it cannot be seriously disputed that the order of the trial court serves legitimate local interests. Clearly, the State of New Jersey has an interest in averting a public health emergency within the tri-county area. Similarly, the state has an inter-

est in managing and conserving its waste disposal capacity through regional planning and coordination of solid waste disposal including interdistrict agreements. Indeed, Congress itself has recognized the need for the development of comprehensive state plans for solid waste disposal and, implicitly, this requires the planned management of waste flows. In enacting the Resource Conservation and Recovery Act of 1976, 42 *U.S.C.A.* §§ 66901-6987, Congress has expressed a strong policy preference for resource recovery. *See* 42 *U.S.C.A.* § 6941. Resource recovery cannot be accomplished if waste streams are not directed. *See Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency,* 715 *F.*2d 419 (8th Cir. 1983) (restraint on waste flows essential to development of comprehensive waste flow plan). The preliminary injunction in the instant case recognizes local responsibilities in this area, responsibilities that clearly require integrated planning.

Petitioner, however, has failed to cooperate in New Jersey's efforts to manage and conserve its waste disposal capacity by restricting the flow of all waste into the Kinsley Landfill, an approach which this Court has endorsed. *See Philadelphia v. New Jersey, supra,* 437 *U.S.* at 626. Rather, as found by the courts below, while waste flows from petitioner increased threefold, waste flows from Camden and Gloucester counties, which did sign interdistrict agreements, remained constant (Pet. App. 9a; 39a). Had petitioner joined in these efforts to control all waste flows to Kinsley, the capacity of the landfill would not be exhausted, the present crisis in the tri-county area would not exist, and sufficient capacity would exist at the landfill to accommodate waste flows from petitioner and the other communities as well.

Further, as set forth above, it is clear that the burden on interstate commerce is not excessive in relation to the local interest served. Philadelphia can accommodate the closure of the landfill, albeit at slightly higher costs for waste disposal, ranging from 2% to 5%. Municipalities in the tri-county area lack feasible alternatives to Kinsley, and lack the trucks, equipment, transfer stations, material and resources to transport their wastes to more distant locations (Pet. App. 40a-43a).

Finally, the Supreme Court of New Jersey properly determined that New Jersey's legitimate local interests could not be promoted in a manner which has a lesser impact on interstate commerce. In this regard, Philadelphia argues that all former users should be allowed continued access at proportionately reduced levels. Yet what this argument ignores is the very factual basis upon which the injunction is based. Were it not for the emergent need of municipalities in the tri-county area, Kinsley would be closed to all users. In order to avert a public health crisis in Southern New Jersey, Kinsley has been kept open to give those municipalities which lack alternative waste disposal options time to develop such alternatives. Yet, a plan that afforded petitioner access, even if proportionately reduced, would foreshorten the life of the landfill and merely delay the public health crisis for a few months. Thus, as stated by the Supreme Court of New Jersey:

> Such a plan would not merely be a less effective means of obtaining time for the development of an alternative site; it would be ineffective. See ***Minnesota v. Clover Leaf Creamery Co., supra.*** . . . So viewed, Philadelphia's demand that the tri-county municipalities incur substantial costs for a short-term solution is not so much a request for a less discriminatory al-

ternative as it is an attempt to place an excessive burden on those municipalities. The ideal is even-handedness. *Sporhase v. Nebraska, supra,* 458 *U.S.* at 956.

In sum, it is clear that the injunction is an evenhanded equitable remedy which is necessary to avoid a local public health emergency and which has only incidental and *de minimus* effects on interstate commerce.

CONCLUSION

It is fundamental that this Court has jurisdiction to review only final judgments of state courts, *i.e.*, judgments which are final as an effective determination of the litigation and not merely an intermediate step therein. In the present case, while the Supreme Court of New Jersey has upheld a preliminary injunction on interlocutory appeal, that decision is but an intermediate step in ongoing litigation. A trial is scheduled for January 14, 1986 at which time petitioner and other parties will present evidence on a variety of factual issues which are inextricably intertwined with petitioner's federal claims. Since the threshold requirement of finality has not been met, the writ of certiorari should be denied.

In addition, it is clear that the preliminary injunction does not discriminate against interstate commerce. Rather, faced with an extraordinary public health emergency, the preliminary injunction represents a proper balance of the equities. It provides for an orderly closure of a landfill which is virtually exhausted by allowing its continued use on a temporary, conditional basis and until alternatives

can be implemented by those communities which would suffer irreparable injury if the landfill were precipitously closed, while excluding those communities able to accommodate the closing of the landfill with minimal inconvenience. Indeed, the facts of the last several months have demonstrated how easily petitioner can accommodate the closure of the landfill. In addition, petitioner's failure to accept an interdistrict waste flow agreement and consequent refusal to share equally with New Jersey communities in the efforts to restrain the flow of all waste to the Kinsley Landfill has itself contributed to the rapid exhaustion of capacity at the facility and helped precipitate the crisis which gives rise to the preliminary injunction. Thus, the injunction provides an evenhanded, nondiscriminatory regulatory approach, serving legitimate local interests, with nothing more than incidental effects on interstate commerce.

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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DATED: November 4, 1985

APPENDIX

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY

DOCKET NO. L-070476-84 P.W.

Civil Action

FACTUAL AND LEGAL CONTENTIONS

BOROUGH OF GLASSBORO, et al.,

Plaintiffs,

v.

GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS, et al.,

Defendants.

I. Lack of Current Solid Waste Emergency:

Current waste flows into Kinsley from the tri-county generators permitted disposal access thereto are averaging between 5,000 and 6,000 cubic yards in truck per day. According to Kinsley's exeprt, the single vertical lift's remaining capacity as of July 11, 1985 was 1,290,000 cubic yards in truck and would last until approximately April 1986 before being fully used up at current flow levels. Camden County generators will stop using Kinsley for

solid waste disposal sometime prior to November 15, 1985 and possibly as early as late September 1985. Gloucester County will, by its own admission, have its County landfill in South Harrison Township operational by November 15, 1985. Other landfills in southern New Jersey, particularly in Atlantic and Cape May Counties have solid waste disposal capacity which could, with NJDEP and BPU cooperation, be utilized by tri-county generators in the event of any dislocation of their above-described waste management plans. Temporary solid waste collecting and hauling services are available to tri-county generators to replace or supplement their present arrangements in the event disposal outside of Gloucester County would become necessary. Kinsley wishes to commence closure procedures on November 15, 1985 or as soon thereafter as possible and requires the single lift to be filled to its design capacity in order to effect an environmentally-sound closure in accordance with NJDEP requirements. Tri-county waste flows will be reduced further if Camden County generators cease using Kinsley prior to November 15, 1985 and if both Camden County and Gloucester County generators cease same on November 15, 1985. Accordingly, the City of Philadelphia should be permitted to resume solid waste disposal at Kinsley in such volume as will ensure that Kinsley reaches capacity on November 15, 1985 or as soon thereafter as is feasible. The City may not, consistent with the Commerce Clause, continue to be excluded from Kinsley in the absence of any present solid waste emergency in the tri-county area as a basis for permanent injunctive relief.

II. Exclusion Because of a Lack of Interdistrict Waste Flow Agreement Would Be Improper:

The City will demonstrate that it was not at fault for the non-consummation of an interdistrict waste flow agreement with Gloucester County between the time it was first requested by NJDEP to enter into same and November 1984. Accordingly, there is no valid factual or legal basis for excluding the City from Kinsley by reason of the absence of such an agreement.

III. Arbitrary and Capricious Action by the County Freeholders in Denying Kinsley's Expansion Application:

The City adopts by reference the contentions of Kinsley Landfill with respect to the unconstitutional anti-Philadelphia animus of the Freeholders being the prime if not sole motivating factor in the Freeholders decision to deny Kinsley's expansion application and thereby precipitate a manufactured solid waste disposal crisis which would result in Philadelphia's ouster from Kinsley.

IV. Equitable Discretion

The City contends that all users of Kinsley as of October 1984 (except the sludge depositors who are now denied access by NJDEP order) should bear equally the burdens of dislocation resulting from Kinsley's reaching capacity and being expanded only by a single vertical lift of approximately 1.8 million cubic yards in truck. The Court should treat all similarly-situated Kinsley users similarly and require pro-rata reductions in waste flows. The City has now exhausted all currently-available alternatives for its waste flow which had been going into Kinsley and thus is

identically-situated with the tri-county generators with respect to the need for access to Kinsley.

Respectfully submitted,

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BY: /s/ Steven Kudatzky

DATED: August 9, 1985